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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Court of Appeals for the Federal Circuit

(Appeal No. 86–750)

PAGODA TRADING CORP., APPELLEE *v.* UNITED STATES, APPELLANT

Saul Davis, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for appellant. With him on the brief were *Richard K. Willard,* Assistant Attorney General, *David M. Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office.

Leonard Rosenberg, Sandler & Travis, of Miami, Florida, argued for appellee.

Appealed from: U.S. Court of International Trade
Judge RESTANI.

(Appeal No. 86–750)

PAGODA TRADING CORP., APPELLEE *v.* UNITED STATES, APPELLANT

(Decided November 3, 1986)

Before FRIEDMAN, SMITH, and BISSELL, *Circuit Judges.*

SMITH, *Circuit Judge.*

The August 27, 1985, judgment of the United States Court of International Trade,[1] holding that certain merchandise imported by Pagoda Trading Corporation (Pagoda) was "deemed liquidated" 1 year after entry into the United States, if affirmed.

ISSUES

The two issues are:

1. Whether the Court of International Trade erred in holding that Pagoda's protest was sufficient to establish jurisdiction for the court to decide the "deemed liquidation" issue, and
2. Whether the Court of International Trade erred in finding that there was no valid basis for suspension of liquidation, that no extension of liquidation was effected, and that Pagoda's entries were deemed liquidated at the rate of duty, value, and amount of duties asserted by Pagoda at the time of entry.

[1] *Pagoda Trading Co. v. United States,* 617 F. Supp. 96 (Ct. Int'l Trade 1985).

BACKGROUND

Pagoda is an importer of Korean footwear, including moon boots and snowmobile boots. This case involves the computation of the duty on Pagoda's imported merchandise.

The final computation of the duty on imported merchandise is known as "liquidation."[2] Generally, merchandise must be liquidated within 1 year after entry into the United States or else it "shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer."[3] The Secretary of the Treasury may extend the 1-year period for liquidation by giving notice of "extension" to the importer for certain reasons including "suspension" of liquidation "as required by statute or court order."[4]

In the present case, the liquidation of Korean footwear was suspended from April 7, 1980, to March 18, 1981, pursuant to the order of the Department of Commerce (Commerce) (based on an earlier countervailing duty order). On five occasions between August 5, 1980, and September 9, 1980, Pagoda entered Korean footwear into the United States, and liquidation was suspended pursuant to the April 7, 1980, Commerce order.

On March 17, 1981, the relevant countervailing duty order was revoked. On March 18, 1981, Commerce notified the United States Customs Service (Customs) to proceed with liquidation of Korean footwear. Notwithstanding the directive to proceed with liquidation, during July and August 1981 Customs sent Pagoda computer-generated notices that liquidation was suspended for at least four of the five entries.

The Court of International Trade held that there was no basis for the computer-generated notices and, thus, the notices were not valid to suspend liquidation. The court also held that the notices of "suspension" were not effective to serve as notices of "extension" of the period for liquidation under 19 U.S.C. § 1504 (1982).

Section 1504 allows only 1 year from the date of entry for liquidation to occur, subject to valid extensions of that period. If the merchandise is not liquidated within 1 year, it "shall be deemed liquidated at the rate of duty * * * asserted at the time of entry by the importer."[5] Thus, the Court of International Trade held that the entries made by Pagoda from August 5, 1980, to September 9, 1980, were deemed liquidated by operation of law 1 year after the entries were made.

Without regard for the "deemed liquidation," on February 26, 1982, Customs stated that it was liquidating all five Pagoda entries using American Selling Price appraisement, resulting in a duty higher than that asserted at the time of entry by Pagoda. On May

[2] 19 C.F.R. § 159.1 (1985).
[3] 19 U.S.C. § 1504(a) (1982).
[4] 19 U.S.C. § 1504(b) (1982).
[5] 19 U.S.C. § 1504(a) (1982).

24, 1982, Pagoda submitted a protest challenging the appraisement and classification of the merchandise. On June 18, 1982, Pagoda filed a supplement to the protest, asserting that the February 26, 1982, liquidation was invalid because of the earlier "deemed liquidation." On July 29, 1982, the protest was denied. Pagoda brought an action in the Court of International Trade contesting the denial of the protest.

The Court of International Trade asserted jurisdiction under 28 U.S.C. § 1581(a) (1982). The court entered summary judgment in favor of Pagoda, holding that the "deemed liquidation" occurred by operation of law prior to the February 26, 1982, liquidation asserted by Customs. The Government appeals. Jurisdiction of the United States Court of Appeals for the Federal Circuit is based on 28 U.S.C. § 1295(a)(5) (1982).

ANALYSIS

A. *Jurisdiction of the Court of International Trade.*

The Court of International Trade has jurisdiction under 28 U.S.C. § 1581(a) (1982) over a civil action to contest the denial of a protest under 19 U.S.C. §§ 1514, 1515 (1982). Pagoda's May 24, 1982, protest was timely filed within 90 days of the February 26, 1982, liquidation asserted by Customs. The May 24, 1982, protest was based on two grounds of objection under 19 U.S.C. § 1514(a):

> (1) the appraised value of the merchandise; [and]
> (2) the classification and rate and amount of duties chargeable[.]

On June 18, 1982, Pagoda filed a supplement to the protest asserting that a "deemed liquidation" had occurred 1 year after each entry, and that Customs' classification and appraisement, as effected by the February 26, 1982, liquidation, were invalid. The trial court found that Pagoda filed the supplement shortly after the time for filing a protest had expired, but prior to disposition of the protest as required by section 1514.

In asserting the "deemed liquidation" issue, the supplement raised a "new ground" of objection under the following category of 19 U.S.C. § 1514(a):

> (5) the liquidation or reliquidation of an entry, or any modification thereof[.]

In *Old Republic Insurance Co.* v. *United States,*[6] the importer protested the duties resulting from a liquidation and later filed a supplement alleging that liquidation was improper because of Customs' failure to send a notice of extension of liquidation. The Court of International Trade held that the supplement was permissible because (1) the original protest was sufficient to advise Customs that the liquidation was being protested and (2) new grounds may be

[6] *Old Republic Ins. Co.* v. *United States,* 8 Ct. Int'l Trade 1 (1984).

presented in support of objections raised by a protest at any time prior to the disposition of the protest.[7]

Here, the trial court found that Pagoda's supplement (raising the new ground of deemed liquidation) was timely because it related to the original protest of the classification and appraisement decisions and because the new ground was raised "prior to the disposition of the protest."[8] The Government has failed to show that the court's findings were clearly erroneous or that the court erred as a matter of law.[9]

The trial court also was correct in holding that the supplement filed by Pagoda challenged the same "decisions" as those challenged in the original protest. Since the supplement did not challenge a different "decision," but merely raised a "new ground" in support of the objections in the original protest, the supplement did not have to be filed within the 90-day period after the February 26, 1982, liquidation asserted by Customs.[10]

The present case is distinguishable from *Computime, Inc.* v. *United States,*[11] involving entries of watches composed of a watch module and case attached to a watchband. Computime filed a timely protest on the classification of the watch modules only. *After* Customs rendered a favorable decision on the first protest, Computime then filed a second protest on the classification of the watchband. The Federal Circuit held that the second protest was impermissible because a decision already had been rendered on a protest involving a separate item in the same entry.

Here, Pagoda was permitted to file the supplement raising "[n]ew grounds in support of objections raised by a valid protest * * * at any time *prior to the disposition of the protest.*"[12] (Emphasis supplied.) Pagoda's supplement related to the original protest in that it objected to the same classification and appraisement decisions effected by the February 26, 1982, liquidation asserted by Customs. The trial court found that the supplement was timely filed with Customs prior to the disposition of the protest, and the Government has failed to show clear error in this finding.

The "deemed liquidation" issue was properly and timely raised before Customs during the section 1514 protest and the section 1515 review. Therefore, the Court of International Trade correctly exercised jurisdiction to decide the "deemed liquidation" issue in the ensuing civil action contesting the denial of the protest.[13]

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[7] "* * * New grounds in support of objections raised by a valid protest or amendment thereto may be presented for consideration in connection with the review of such protest pursuant to section 1515 of this title at any time prior to the disposition of the protest in accordance with that section. * * *" 19 U.S.C. § 1514(c)(1) (1982).

[8] *Id.*

[9] FED. R. CIV. P. 52(a); *Daw Indus., Inc.* v. *United States,* 714 F.2d 1140, 1142, 1 Fed. Cir. (T) 146, 148 (1983).

[10] *Cf.* 19 U.S.C. § 1514(c)(1) (1982):

"* * * A protest may be amended, under regulations prescribed by the Secretary, to set forth objections as to a decision or decisions described in subsection (a) of this section which were not the subject of the original protest, in the form and manner prescribed for a protest, any time prior to the expiration of the time in which such protest could have been filed under this section. * * *"

[11] *Computime, Inc.* v. *United States,* 772 F.2d 874 (Fed. Cir. 1985).

[12] 19 U.S.C. § 1514(c)(1) (1982).

[13] 28 U.S.C. § 1581(a) (1982).

B. *Deemed Liquidation.*

Section 1504 of 19 U.S.C. sets a limit of 1 year for liquidation (final computation of duty) of imported merchandise. The 1-year period may be extended "by giving notice of such extension to the importer" for any of the following reasons:[14]

> (1) information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer;
> (2) liquidation is suspended as required by statute or court order; or
> (3) the importer, consignee, or his agent requests such extension and shows good cause therefor.

Here, Customs sent computer-generated notices of "suspension" to Pagoda in July and August 1981. The Government concedes that it does not know why these notices were sent, stating only that the computer previously had been programmed to send the notices automatically. The trial court correctly held that there was no valid basis for suspension of liquidation "as required by statute or court order,"[15] since the countervailing duty order had been revoked and Customs had been directed to *proceed* with liquidation several months before the notices of suspension were sent.

The Government argues that the notices of "suspension" should be considered notices of "extension," as authorized by the broader three categories of section 1504(b), and that the use of incorrect terminology was harmless error. The trial court, however, held that "[n]o such notice of an extension was given to plaintiff in this case."[16] The court found that there was no evidence that any authorized official had granted an extension, and that there was no basis for extension such as a lack of information available to Customs or a request by the importer for an extension.[17]

Since there was no extension of the period for liquidation, the merchandise imported by Pagoda was "deemed liquidated" 1 year after the respective entries, "at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer."[18] The "deemed liquidation" occurred by operation of law prior to the February 26, 1982, liquidation asserted by Customs.

CONCLUSION

The Government has failed to demonstrate that the trial court's findings were clearly erroneous or that the court erred as a matter of law.[19] The judgment of the Court of International Trade, holding that liquidation was deemed to have occurred by operation of law

[14] 19 U.S.C. § 1504(b) (1982).
[15] 19 U.S.C. § 1504(b)(2) (1982).
[16] *Pagoda*, 617 F. Supp. at 99; *see Old Republic*, 8 Ct. Int'l Trade at 3.
[17] 19 U.S.C. § 1504(b)(1), (3) (1982); *see* 19 C.F.R. § 159.12 (1985).
[18] 19 U.S.C. § 1504(a) (1982); *see Old Republic*, 8 Ct. Int'l Trade at 3.
[19] FED. R. CIV. P. 52(a); *Daw Indus.*, 714 F.2d at 1142, 1 Fed. Cir. (T) at 148.

prior to the February 26, 1982, liquidation asserted by Customs, is affirmed.

AFFIRMED

(Appeal No. 86–750)

PAGODA TRADING CORP., APPELLEE *v.* UNITED STATES, APPELLANT

BISSEL, *Circuit Judge,* dissenting in part.

I respectfully dissent from that portion of the majority's opinion which holds that Pagoda's protest was sufficient to establish jurisdiction for the court to decide the "deemed liquidation" issue. Although there is certainly merit to the majority's view, I am not convinced of the soundness of its conclusory treatment of the term "decision" in 19 U.S.C. § 1514. The majority merely states, as if it is intuitively obvious, that "deemed liquidation" is a "new ground" under 19 U.S.C. § 1514(c)(1) and the "liquidation" is not a separate decision from the "appraisement" or "classification" decisions.

Section 1514(a) provides that:

> [D]ecisions of the appropriate customs officer * * *, as to—
> (1) the appraised value of merchandise;
> (2) the classification and rate and amount of duties chargeable; * * *
> * * * * * * * *
> (5) the liquidation or reliquidation of an entry, * * *
> shall be final and conclusive upon all persons unless a protest is filed * * *. [Emphasis added].

Section 1514(c)(1) provides:

> "A protest of a *decision under subsection (a)* * * * shall be filed in writing * * * setting forth distinctly and specifically *each decision* described in subsection (a) of this section as to which protest is made * * *. A protest may be amended, under regulations prescribed by the Secretary, to set forth objections as to a decision or decisions described in subsection (a) of this section which were not the subject of the original protest, in the form and manner prescribed for a protest, any time prior to the expiration of the time in which such protest could have been filed under this section. [Emphasis added].

It is my view that the supplement filed by Pagoda constitutes a challenge to the decision to "liquidate," a § 1514(a)(5) decision, and is not merely a "new ground" to challenge the "appraisement," a § 1514(a)(1) decision, or the "classification," a § 1514(a)(2) decision.

It appears that the majority opinion holds that henceforth an importer may challenge any aspect of the Customs Officer's entry determination at any time before disposition of the protest because only "one" administrative decision is actually made rather than

separate and distinct administrative decisions regarding appraisement, classification, liquidation, etc. *See* 19 U.S.C. § 1514(a)(1)–(7). Restated, the decision *to liquidate* (legality of the act) is subsumed within a decision on appraisement or classification (correctness of the act). While this holding may be pleasing to sound notions of equity, it does not square with the statute's delineation of "separate and distinct decisions" that are made by the Customs Officers at time of possible entry. *See United States* v. *Deringer*, 593 F.2d 1015, 1020 (CCPA 1979) ("The statute contemplates that both the legality and correctness of a liquidation be determined, at least initially, via the protest procedure. The wording of this statute makes it clear that any challenge to the propriety of a liquidation [not specifically excepted] must be through this statute.") *Cf. Computime, Inc.* v. *United States*, 772 F.2d 874 (Fed. Cir. 1985) (a protest must set forth distinctly and specifically the challenges to an entry).

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

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Decisions of the United States Court of International Trade

(Slip Op. 86–107)

PHILIPP BROTHERS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84–4–00528

[Decision on remand upheld.]

(Decided October 22, 1986)

Donohue and Donohue (James A. Geraghty), for plaintiff.
Richard K. Willard, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, and *Elizabeth C. Seastrum*, Civil Division, United States Department of Justice, for defendant.

OPINION

RESTANI, *Judge:* This is a challenge to an annual review determination of the International Trade Administration of the Department of Commerce ("Commerece") regarding countervailing duties on exports of Brazilian pig iron. On February 14, 1986, this court remanded this matter to Commerce for reconsideration of two findings. *Philipp Bros., Inc.* v. *United States*, 10 CIT ——, 630 F. Supp. 1317 (1986), *appeal dismissed*, No. 86–1122 (Fed. Cir. July 18, 1986). First, the court found that there was no adequate explanation for the use of a country-wide methodology in calculating additional duties based on subsidies, given the availability and previous use of company specific data demonstrating substantial differences in the subsidies provided various companies. *Id.* at 1322–23. The court later made clear that reconsideration of the methodology utilized was required.

On remand, Commerce determined that in calculating a country-wide subsidy rate it would not include data on subsidies provided one particular producer, inasmuch as such subsidies materially varied in amount from those provided other relevant producers. Plaintiff does not challenge this result and the court will not address it further.

Second, the court directed Commerce to clarify whether it treated failure to timely collect a tax to offset an export credit subsidy as a

separate countervailable subsidy. Commerce has clarified that this is not a separate subsidy, rather the delay is considered in calculating the value of the credit subsidy. The treatment of the tax offset will be reviewed on this basis.

The record before the court indicates the following. Producers of pig iron qualify for the Brazilian government's export credit upon shipment. Actual payment of this credit does not occur at a fixed time thereafter, due to delays in making application for the subsidy and administrative variables. Normally, payment would occur, however, within two to three months of shipment. Following negotiations with the United States, the Brazilian government agreed that the export credit would be offset by a tax to be levied on the concerned producers. The United States was advised that collection of the tax would occur in mid-1981.[1] Collection actually began on December 31, 1982. Commerce indicates that, in conformity with the terms of a suspension agreement regarding tool steel from Brazil, it would have considered the credit fully offset, if a tax in the same amount were paid within forty-five days of shipment. Inasmuch as the taxes were not paid within forty-five days of any 1981 shipment, the amount of the tax offset was reduced by an amount equivalent to the value of an interest-free loan made forty-five days after shipment.

Plaintiff argues that this methodology is unreasonable, arbitrary and capricious because the credit is accounted for upon accrual, that is, the date of shipment. To be consistent, plaintiff argues, the tax offset must also be accounted for upon accrual, presumably, the date of shipment.[2] Such procedure would result in a total offset. Plaintiff is correct on one point. Symmetry in accounting for credits and their corresponding offsets is desirable, but the issue here is whether this apparent lack of symmetry renders Commerce's procedures unlawful.

One approach to this issue is to examine how plaintiff's proposed methodology relates to reality. Under plaintiff's view the credit and offset would be accounted for upon shipment, thus eliminating any calculation for delay in payment. Here only the credit possibly was paid within a relatively short time of shipment. The tax certainly was not paid any earlier than one year from the time of shipment. Thus, there is no real symmetry in plaintiff's proposed methodology, it is merely a way of ignoring the delay.[3]

Presumably, producers price with a view to credits they know will be received. Reasonable producers also price with a view to taxes which will not be collected or will be collected at some far-off time. In this case, the implementing administrative decree by the Brazilian government set no time for the payment of the offset tax, a like-

[1] The year under review was 1981. The reference in the court's earlier opinion to 1980 was inadvertent. *Philipp Bros., Inc.* v. *United States*, 630 F. Supp. at 1319.

[2] It is not entirely clear from the record when a tax accrues under Brazilian law.

[3] Plaintiff indicates that it does not seek a cash basis accounting because the record does not contain the necessary information.

ly signal that some delay in collection would occur. Therefore, accounting for the delay probably serves the goals of the countervailing laws. That is, although subsidies need not be directly related to prices, subsidization tends to allow lower prices, a situation Congress attempts to remedy through the imposition of additional duties. Most importantly, however, there was nothing unlawful or unfair to plaintiff about the methodology chosen by Commerce. Given the facts available to Commerce it was reasonable, both in terms of countervailing law generally, and with regard to plaintiff in particular.

Commerce's determination on remand is upheld.

(Slip Op. 86–108)

NATURE'S FARM PRODUCTS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84–05–00605

OPINION

[Defendant's motion to dismiss granted.]

(Decided October 22, 1986)

Mosher, Pooley, Sullivan & Hultquist (Alan B. Kalin) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice (*Saul Davis*) for the defendant.

AQUILINO, *Judge:* A civil action contesting the denial of a protest under section 515 of the Tariff Act of 1930 may be commenced in this Court of International Trade "only if all liquidated duties, charges, or exactions have been paid at the time the action is commenced". 28 U.S.C. § 2637(a).

Pursuant to CIT Rule 5(g), this action was deemed commenced on April 23, 1984, the date on which a summons was sent by certified mail to the Clerk of the Court contesting Customs Service denial on October 26, 1983 of a protest by the above-named importer. Thus, in accordance with 28 U.S.C. § 2636(a), the 180th or last day to commence this action was April 23, 1984, at which time counsel claims to have caused a check in the requisite amount in dispute to be mailed to Customs.

Receipt of the money after the deadline has engendered a motion by the defendant to dismiss this action on the ground of failure to comply with 28 U.S.C. § 2637(a). That is:

> * * * [M]ailing a check for the duties does not qualify the duties as "having been paid" under § 2637(a) * * *. Rather for a plaintiff to have fulfilled the mandatory statutory conditions precedent to suit, Customs must have *received* payment of the duties *prior* to commencement of this action.[1]

[1] Defendant's Response to Plaintiff's Opposition to Defendant's Motion to Dismiss, p. 3 (emphasis in original).

In the face of the statute's clear mandate[2], the plaintiff seeks to rely on *Champion Coated Paper Co.* v. *United States*, 24 CCPA 83, T.D. 48411 (1936), and *Dynasty Footwear* v. *United States*, 4 CIT 196, 551 F.Supp. 1138 (1982). Neither case, however, aids the plaintiff. In *Champion Coated Paper*, the court held that, in order to protest reliquidation of drawback entries under the Tariff Act of 1922, an importer must have repaid the refunded duties. In its opinion, the court explained that part of the rationale for this condition precedent is that an importer be "actionably damaged." 24 CCPA at 89. The decision does not suggest that late payment of duties satisfies this requirement.

Dynasty Footwear also does not modify the requirement of timely payment of duties owed. In that case, the court found that monies sufficient to pay those duties were already in the possession of Customs prior to commencement of the action as a result of a protest as to another entry. *See* 4 CIT at 197, 551 F.Supp. at 1139. The amount owed to the importer on that entry exceeded the duties it had to pay to start the action, and the court concluded that set-off pursuant to 19 C.F.R. § 24.72 should have been made when it reasonably could have been made, which was deemed prior to the date of commencement. *See* 4 CIT at 201, 551 F.Supp. at 1142.

The plaintiff urges this court "to do justice where it need be done"[3] by denying defendant's motion. However, this court is not persuaded that it has discretion in the matter. For example, in *United States* v. *Lockheed Petroleum Services, Ltd.*, 709 F.2d 1472 (Fed.Cir. 1983), the court held that the importer was not entitled to an award of drawback duties because it had failed to timely file an abstract of manufacture with the district director, as mandated by regulation. The abstract had been mailed, but failed to arrive on time, whereupon the court pointed out that the importer

> could have filed the abstract in a timely fashion in any number of ways to ensure compliance with the regulation, utilizing such well-known means as a telecopier, a messenger, or an overnight courier service. If it wished to use the U.S. Postal Service, it could have resorted to express mail, special delivery, or registered mail. It chose instead to rely solely on the ordinary post. 709 F.2d at 1475.

The importer was found to have been negligent in allowing only five days for the abstract to be mailed from Louisiana to New York and then back to Louisiana.

Here, of course, the plaintiff did not allow any time for the check to be delivered before the deadline. In *Lockheed*, the court stated that "[e]quitable powers, even if available, should not be invoked to excuse the performance of a condition by a party that has not acted with reasonable due care and diligence." 709 F.2d at 1475. Recently, the Federal Circuit has reiterated that the

[2] *See Bulova Watch Co., Inc.* v. *United States*, 9 CIT 67 (1985).
[3] Plaintiff's Memorandum, p. 8.

> terms and conditions upon which the United States has waived its sovereign immunity in consenting to be sued in the Court of International Trade * * * must be strictly observed and are not subject to implied exceptions * * *. If a litigant fails to comply with the terms upon which the United States has consented to be sued, the court has no "jurisdiction to entertain the suit."[4]

The plaintiff argues that "it is generally true that the date of mailing is determinative in connection with the commencement of an action." Plaintiff's Memorandum, p. 5, n. 2. CIT Rule 5(g) is referred to in an attempt to show that the question at bar is governed by its provision that:

> Service or filing of any pleading or other paper by delivery or by mailing is completed when received, except that a pleading or other paper mailed by registered or certified mail properly addressed to the party to be served, or to the clerk of the court, with the proper postage affixed and return receipt requested, shall be deemed served or filed as of the date of mailing.

This rule, however, applies to the filing of papers with the court, not to payment of duties owed to Customs.[5]

This national court provides for the needs of out-of-town parties and their counsel. *Cf. Modern Clothing, Inc.* v. *United States,* 73 Cust.Ct. 233, C.R.D. 74–10 (1974); *Texas Mex Brick & Import Co.* v. *United States,* 72 Cust.Ct. 291, C.R.D. 74–2, 371 F.Supp. 579 (1974). But the plaintiff herein was not prejudiced by the geography involved since its check was mailed on the 180th or last day and could not have arrived in a timely manner regardless of locality. Plaintiff's situation is thus in sharp contrast to that of the plaintiff in *Charlson Realty Company* v. *United States,* 384 F.2d 434 (Ct.Cl. 1967), which had allowed "substantially more than sufficient time"[6] to mail its petition for a refund of income taxes to the Court of Claims for filing. Moreover, it was not argued in *Charlson* that the mailing date should be held to be synonymous with the filing date. *See* 384 F.2d at 447 (Jones J., concurring).

The plaintiff takes the position that the rationale for the "Mailbox Rule", which is known to all law students"[7], should be applied here. According to *Adams* v. *Lindsell,* 106 Eng.Rep. 250 (K.B. 1818), an acceptance of an offer by mail is effectuated upon the mailing of the acceptance. But, as Professor Corbin points out:

> * * * For almost all purposes, other than the acceptance of an offer, the mere mailing of a letter is not enough to attain the purpose. Unless it is clearly otherwise agreed, the mailing of a letter is not a sufficient notice to quit a tenancy, it is not actual payment of money that is inclosed, it does not transfer title to a

[4] *Georgetown Steel Corporation* v. *United States,* —— F.2d. —— (Fed.Cir. Sept. 18, 1986) (citations omitted).

[5] Furthermore, the rule specifies the mode of mailing. While the record shows receipt herein of plaintiff's summons by certified mail, it also indicates that the check in question was placed in the regular mail by counsel's secretary, and the court notes in passing that an action can be dismissed for failure to affix proper postage. *See, e.g., NEC Corporation* v. *United States,* 9 CIT 557, 622 F.Supp. 1086 (1985), *reh'g denied,* 10 CIT ——, 628 F.Supp. 976 (1986).

[6] 384 F.2d at 447 (Jones J., concurring).

[7] Plaintiff's Memorandum, p. 5.

> check or other document; it will not ordinarily be sufficient notice required by a contract as a condition precedent to some contractual duty of immediate performance. 1 Corbin, Contracts § 80 (1963 ed.) (footnotes omitted).

This analysis has support in case law. For example, in *Sizemore* v. *E.T. Barwick Industries, Inc.*, 225 Tenn. 226, 465 S.W.2d 873 (1971), the court held that a suit for workmen's compensation was timely commenced as it had been filed within one year of actual receipt of the last voluntary payment made by the insurance carrier. The trial judge's view that the suit was barred by the statute of limitations, as it had been instituted more than a year from the date of mailing, was rejected. In *Stream* v. *C.B.K. Agronomics, Inc.*, 79 Misc.2d 607, 361 N.Y.S.2d 110 (Sup.Ct. N.Y. Co. 1974), *modified on other grounds*, 48 App.Div.2d 637, 368 N.Y.S.2d 20 (1st Dep't 1975), the failure of a debtor's monthly installment payment to arrive on time in the mail was ground for immediate loan repayment under an acceleration clause of a promissory note.

Finally, counsel's attempt to equate plaintiff's position with that of a federal taxpayer is also unpersuasive in view of 26 U.S.C. § 7502, which specifically provides that timely mailing of taxes is treated as timely payment thereof. The absence of a similar provision governing payment of duties owed to Customs compels the court to enter judgment, granting defendant's motion to dismiss this action.

(Slip Op. 86–109)

WREGG IMPORTS, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 82–07–00961

Before DICARLO, *Judge.*

Plaintiff challenges classification of wooden "matreshkas" as dolls under item 737.22 of the Tariff Schedules of the United States (TSUS), contending that the merchandise is properly classified as articles of wood, not specially provided for, under item 207.00, TSUS. Plaintiff argues that the merchandise is not a doll because it does not have distinct body parts, does not resemble a child's plaything, and is not known as a doll in the United States.

Held: The merchandise is a doll and is properly classified under item 737.22, TSUS. A doll within the meaning of the TSUS does not have to be anatomically correct. The subject merchandise represents a human, resembles a child's plaything and is primarily known and used as a doll in the United States.

[Judgment for defendant.]

(Decided October 23, 1986)

Stein Shostak Shostak & O'Hara (Joseph P. Cox) for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Civil Division, Department of Justice *(Judith M. Barzilay* and *Nancy E. Reich)*, for defendant.

DiCarlo, *Judge:* Plaintiff challenges the United States Customs Service (Customs) classification of certain "matreshkas" as dolls under item 737.22 of the Tariff Schedules of the United States (TSUS). Plaintiff contends the merchandise is properly classifiable as articles of wood, not specially provided for, under item 207.00, TSUS. The Court concludes that the merchandise was correctly classified as a doll under item 737.22, TSUS.

Based upon the stipulations, exhibits and testimony at trial, the Court finds that matreshkas are wooden articles handcrafted and hand painted in various regions of the Union of Soviet Socialist Republics (U.S.S.R.). Each matreshka is comprised of wooden components, each "nested" inside of the next larger component. With the exception of the very smallest, each of the matreshka's components is hollow in construction.

Generally "bowling-pin" in shape, the matreshkas come in various sizes with between 3 and 18 separate nested components. The nested parts are not sold separately and are not interchangeable with components of another matreshka since each is individually crafted. Each component has a painted human face (including hair, eyebrows, eyelashes, eyes, nose, mouth and cheeks) and peasant-style clothing indicative of the region in the U.S.S.R. where crafted. Components also may have painted-on arms, hands and fingers.

Plaintiff first contends that the matreshkas are not dolls because they do not possess distinct human limbs and other body parts. After examination of the relevant caselaw in which particular articles were adjudged to be dolls or not dolls, the Court finds no requirement that a doll have distinct arms, legs and other human features. Often dolls do not have identifiable hands, fingers, toes, feet, ears and other human attributes, while some dolls only have these and similar features such as nose, mouth, and eyes painted-on. *See* trial transcript at p. 86; defendant's exhibit A–1.

The Court concludes that an article does not have to be anatomically correct to be classified as a doll under the TSUS when its overall effect is representative of a human. The matreshkas under consideration clearly represent humans. They depict Slavic peasants with relatively realistic human faces and clothing typical of the region in which they are manufactured.

Plaintiff next suggests that the ruling in *American Customs Brokerage Co.* v. *United States,* 60 Cust. Ct. 23, C.D. 3246, 278 F. Supp. 316 (1968) establishes three criteria to be met before an imported article is to be viewed as a doll under the TSUS. The court in that case held that certain figures of Hawaiian hula girls, mounted by spring on a magnetic metal base, are dolls within the meaning of the TSUS because the record established "(i) that they are similar to dolls used as children's playthings; (ii) that they are used for ornamental purposes; and (iii) that they are known as 'dolls' in the wholesale and retail trade." *Id.* at 26, 278 F. Supp. at 319. Plaintiff argues that the subject merchandise does not satisfy the first crite-

rion since a matreshka is an unamusing and non-communicative "static" object which does not "resemble" a child's plaything.

The court in *American Customs Brokerage* held that the merchandise before it was a doll based upon three independent factual findings. The court did not intend that its findings become criteria for determining in all cases whether an article is a doll. For example, an article could still be found to be a doll even though used for purposes other than ornamentation or in the absence of proof that it is known as a doll in the trade or industry.

As in *American Customs Brokerage* in any event, the Court after examining the exhibits finds that the merchandise does "resemble" a child's plaything. Even though no testimony at trial indicates that it is actually used as a child's toy, the Court accepts as established the rule that a doll also can be used for decorative, ornamental, or religious purposes. *See, e.g., Russ Berrie & Co., Inc.* v. *United States,* 76 Cust. Ct. 218, 223–24, C.D. 4659, 417 F. Supp. 1035, 1039–40, *appeal dismissed,* 63 CCPA 125 (1976) (and cases cited therein).

Defendant is correct in recognizing that the provision for dolls is an *eo nomine* one, as opposed to a use provision. *See Id.* at 223, 417 F.Supp. at 1039. Defendant leads us to believe that acknowledging dolls as an *eo nomine* provision resolves any controversy in the present case. An *eo nomine* provision is one which describes merchandise by a specific name, usually one well known in the trade, which includes all forms of the article as if each were provided for by name in the tariff provisions.

It begs the question, however, to argue that a matreshka is therefore a doll because doll within the meaning of the TSUS includes all forms of the article. The question to be answered by this Court is whether the matreshkas under consideration are to be identified as a doll within the meaning of the TSUS. The *eo nomine* aspect becomes helpful in providing a category for classification in the TSUS only after this determination.

In *United States* v. *Quon Quon Co.,* 46 CCPA 70, C.A.D. 699 (1959) the court held that the ultimate use of a product in the United States may be considered in order to determine an article's identity in relation to an *eo nomine* provision. The *Quon Quon* Court reasoned that "[of] all things most likely to help in the determination of the identity of a manufactured article, beyond the appearance factors of size, shape, construction and the like, *use is of paramount importance." Id.* at 73 (emphasis added).

The Court finds that matreshkas are sold primarily as dolls and used by doll enthusiasts to enhance their collections. Defendant's exhibits C and D are representative samples of importers' advertisements describing matreshkas as dolls. Defendant's witness testified that she considered matreshkas to be dolls, basing this opinion upon her experience as a doll collector and upon several books and articles, including her own, which refer to them as such. She also testified she has purchased matreshkas from the doll sections of toy

stores and has seen them on display at doll shows. Defendant's other witness, a Customs official responsible for the TSUS provision covering dolls, testified that he has seen matreshkas for sale in the doll section of the United Nations gift shop.

Plaintiff's witnesses offered opinion testimony that matreshkas are not dolls. Certain of plaintiff's witnesses further testified that they have seen them sold in sections of stores not dedicated to dolls and have themselves held them out as Russian folk art rather than dolls. Although some importers and store owners may not consider matreshkas to be dolls, the Court finds after weighing the evidence that matreshkas are predominately known and used (sold and collected) as dolls in the United States.

The Court concludes that plaintiff has failed to rebut the presumption in favor of defendant by demonstrating Customs classification to be incorrect. The Court affirms the classification of the merchandise as dolls under item 737.22, TSUS. Judgment will be entered accordingly.

(Slip Op. 86–110)

MILLER AND CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84–4–00576

[Dismissed.]

(Decided October 24, 1986)

Plaia & Schaumberg, Chartered (*Herbert C. Shelley* and *Joel D. Kaufman*), for plaintiff.

Richard K. Willard, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, and *Elizabeth C. Seastrum*, Civil Division, United States Department of Justice, for defendant.

OPINION

RESTANI, *Judge:* This action challenges a determination upon the annual review of a countervailing duty order regarding Brazilian pig iron. The year under review was 1981. In this court's previous opinion in this matter, *Miller and Co.* v. *United States*, 8 CIT 281, 598 F. Supp. 1126 (1984), this court determined that no jurisdiction existed for an action under 28 U.S.C. § 1581(c) (1982) inasmuch as plaintiff did not participate in the underlying administrative proceedings. *See* 19 U.S.C. § 1516a(a)(2)(A) (1982) (participation made a prerequisite to suit). The only possible jurisdictional basis remaining for suit is 28 U.S.C. § 1581(i) (1982), the residual jurisdiction of the court. In the court's previous opinion, the court determined that such jurisdictional basis would be proper only if defendant's actions were patently *ultra vires*, so that plaintiff could not be expected to participate administratively. The court found it could not make

such a determination without briefing on the merits of the action. *Miller,* 8 CIT at 286, 598 F. Supp. at 1131.

This matter has now been briefed fully. In the interim, *however,* two cases have been decided which shed light on this matter, and which lead to the conclusion that the defendant did not act in an *ultra vires* manner in issuing the challenged determination. The first is *Ambassador Division of Florsheim Shoes,* 748 F.2d 1560 (Fed. Cir. 1984). The second is *Philipp Bros., Inc.* v. *United States,* 10 CIT ——, 630 F. Supp. 1317 (1986), *appeal dismissed,* No. 86–1122 (Fed. Cir. July 18, 1986).

In *Florsheim,* the Federal Circuit determined that suspension of liquidation pending completion of the relevant annual review was required by the countervailing duty laws. The court in *Philipp Bros.* found that such a suspension does not terminate prior to completion of the review, even if the Commerce Department does not complete its review within the statutorily directed time. *See* 19 U.S.C. § 1675(a) (1982) (review to be completed "[a]t least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order").[1] In essence, the court found that the time limits of § 1675(a) are not jurisdictional,[2] and that governmental delay alone does not preclude completion of the administrative process. Furthermore, because a statutorily required suspension was in effect, the court found that 19 U.S.C. § 1504 (1982) did not prevent imposition of additional duties by effecting a liquidation by operation of law.[3] Plaintiff has raised no arguments which convince the court that *Philipp Bros.* is in error. *Philipp Bros.* flows directly from *Florsheim.* There is no way to distinguish this case from *Philipp Bros.* on this point. *Stare decisis* applies. Thus, the court concludes that Commerce did not act beyond its authority here.

Accordingly, the court finds that there is no jurisdiction for this action under 28 U.S.C. § 1581(i) and it is dismissed.

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[1] 19 U.S.C. § 1675(a) was amended in 1984 to make annual reviews necessary only upon request. Trade and Tariff Act of 1984, Pub. Law 98–573, § 611(a)(2)(A), 98 Stat. 3031 (1984).

[2] A suit to compel timely action may be the appropriate response to failure to comply with 19 U.S.C. § 1675(a). *American Permac, Inc.* v. *United States,* 10 CIT ——, Slip Op. 86–83 (August 12, 1986); *see also UST, Inc.* v. *United States,* 10 CIT ——, Slip Op. 86–100 at 12 (October 10, 1986) (citing *Philipp Bros.*).

[3] Liquidation is the term for the finalization of the duty assessment process. 19 U.S.C. § 1504 (1982) read in relevant part:

> (a) Liquidation
> Except as provided in subsection (b) of this section, an entry of merchandise not liquidated within one year from:
> (1) the date of entry of such merchandise;
> * * * * * * *
> shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer, his consignee, or agent. * * *
> (b) Extension
> The Secretary may extend the period in which to liquidate an entry by giving notice of such extension to the importer, his consignee, or agent in such form and manner as the Secretary shall prescribe in regulations, if —
> * * * * * * *
> (2) liquidation is suspended as required by statute or court order;
> * * * * * * *

Later amendments to this provision are irrelevant to the issues at hand.

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